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WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS d/b/a REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; and LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Petitioners,

– v. –

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services; MARI ROBINSON, Executive Director of the Texas Medical Board, in their official capacities,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF REPUBLICAN MAJORITY FOR CHOICE AND ITS NATIONAL CHAIRS, FORMER REPUBLICAN MEMBERS OF CONGRESS, AND CURRENT AND FORMER REPUBLICAN STATE OFFICEHOLDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Republican Majority for Choice and its National Co-Chairs Susan J. Bevan and Candace Straight and National Vice-Chair Colleen McAndrews as individuals; former Republican Members of Congress; and current and former Republican state officeholders submit this *amicus curiae* brief in support of Petitioners.[1] As Republicans, *amici* believe in limited government, minimal regulation, and the inviolability of rights reserved to the individual. *Amici* believe that these values should extend to all policy areas, including social issues. *Amici* are opposed to unwarranted government intrusion into the fundamental rights of women, and particularly to the use of pretext to deny women their constitutional right to liberty in matters concerning procreation and a woman's right to prevent or terminate her pregnancy.

Republican Majority for Choice ("RMC") is a national organization with members in all 50 states committed to limiting the scope of government intrusion in the personal lives of Americans. RMC works with legislators on numerous issues, including improving access to affordable contraception, lessening the incidence of unintended pregnancies, and developing new approaches to sex education that provide students with medically accurate, age-appropriate information; educates voters about issues

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[1] The parties in this case have consented to the filing of this *amicus curiae* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution to the preparation or submission of the brief.

relating to the right to choose whether to terminate a pregnancy and the benefits of making services available to women that may help to prevent pregnancy; and supports pro-choice Republican candidates to ensure a strong mainstream voice within the Republican caucus.

Other *amici curiae* are Republican leaders who have served or are currently serving in elected office at the federal and state level.

FEDERAL

The Honorable Nancy Johnson
Former Member of the U.S. House of Representatives for the State of Connecticut

The Honorable Constance Morella
Former Member of the U.S. House of Representatives for the State of Maryland

The Honorable Claudine Schneider
Former Member of the U.S. House of Representatives for the State of Rhode Island

The Honorable Christopher Shays
Former Member of the U.S. House of Representatives for the State of Connecticut

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STATE

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The Honorable William Weld
Former Governor of Massachusetts

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The Honorable Daniel B. Winslow
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The Honorable Corinne Wood
Former Lieutenant Governor of Illinois
Former Member of the Illinois House of Representatives

Amici have, combined, served more than 250 years in office, and have represented Arizona, California, Connecticut, Illinois, Kansas, Maryland, Massachusetts, New Jersey, North Dakota, Rhode Island, Texas, and Vermont at the state or national level. As elected officials and former officeholders, *amici* have dedicated their lives to representing constituents' interests and protecting their fundamental rights, and have an interest in ensuring that rights guaranteed by the Constitution are recognized and respected by lawmakers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), which recognized that the Constitution protects a woman's right to choose whether to terminate a pregnancy without unwarranted government interference, women have been guaranteed the ability to exercise control over their reproductive lives. The government may take measures to further the health or safety of a woman seeking an abortion, and may promote the state's interest in potential life, but may not place a substantial obstacle in a woman's path so as to unnecessarily restrict a woman's right to freely choose to end an unwanted pregnancy. In a society that prizes liberty and the rights of the individual, this limitation on government regulation is precisely as it should be: whether and when to have a child is a choice left to the person whose future, mental and physical well-being, and bodily integrity are affected by the decision.

In keeping with our country's heritage of freedom, this Court has long found that certain personal decisions central to individual dignity and autonomy, although not specifically carved out as exempt from government interference in the Constitution, are nevertheless protected by the concept of liberty embodied in the Constitution. It is from this jurisprudence that the right to choose to terminate a pregnancy—among the most personal and significant decisions a woman can make in her lifetime—arose.

Individual liberty is also central to the philosophy of the Republican Party, which, since its founding as a Party steadfastly opposed to slavery, has been

dedicated to the protection of individual liberties and opposed to governmental infringement of those liberties. The first Republican Party Platform in 1856 declared that "[t]he maintenance of the principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution are essential to the preservation of our Republican institutions" and affirmed that Republicans, "believing that the spirit of our institutions as well as the Constitution of our country, guarantees liberty of conscience and equality of rights among citizens, . . . oppose all legislation impairing their security."[2] Republicans continue to value a circumscribed and minimally intrusive government. And although the Republican Party has undergone many changes since its inception, its general commitment to the concept that liberty means freedom from unwarranted governmental intrusion has endured. Indeed, the 2012 Republican Platform articulates these general principles: "Trust the people. Limit government."[3]

In recent years, a number of state legislatures have passed laws that impose highly restrictive regulations on physicians who provide abortion services and thereby intrude into one of the most private decisions a woman or a family will ever make. Lawmakers frequently claim the regulations are designed to protect the health and safety of women seeking abortions, but this claim is wholly unsupported by the facts. The regulations are, instead, a thinly-veiled

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[2] *Republican Platform of 1856*, http://www.ushistory.org/gop/convention_1856republicanplatform.htm (last visited Dec. 28, 2015).

[3] Republican National Committee, *Republican Platform 2012* ii, https://cdn.gop.com/docs/2012GOPPlatform.pdf.

attempt to do on false pretenses what cannot be done openly: restrict the constitutional right to terminate a pregnancy before viability.

This enactment of pretextual regulations is precisely the situation presented in Texas, where the state legislature enacted Texas House Bill 2 ("H.B. 2"), 83rd Leg., 2d Called Sess. (Tex. 2013), a statute that imposes a number of requirements on physicians who provide abortion services and the facilities where such services are performed. At issue in this case are two particular provisions: a requirement that facilities in Texas where abortion services are provided conform to the standards of ambulatory surgical centers, and a requirement that physicians who provide abortion services obtain admitting privileges at local hospitals. However, neither requirement enhances the quality or safety of medical care provided to women. *See* Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Petitioners, *Whole Woman's Health v. Cole, petition for cert. filed*, No. 15-274 (Sept. 2, 2015), 2015 WL 5834176 (*amicus curiae* brief in support of Petitioners' request for a writ of certiorari). On the contrary, the requirements have caused a massive reduction in the number and geographic distribution of facilities that provide abortion services in the state of Texas, leading to delays in the provision of abortion services and attendant health risks, and for some, the outright denial of safe and legal abortion services. Indeed, it is this latter effect, rather than the pretextual protection of women's health, that the

challenged provisions of H.B. 2 were plainly intended to advance.[4]

As discussed below, under this Court's precedents, the government may not enact laws that unduly burden a woman's right to terminate her pregnancy. *See* Section II.B., *infra*. As Republicans, *amici* are steadfastly opposed to governmental infringement of fundamental rights. Such infringement runs counter to our values as Republicans, to our values as Americans, and to more than a century of this Court's jurisprudence. Further, we object to attempts by the government to do surreptitiously, on the basis of pretext, what it cannot do openly. To allow laws to stand that plainly serve no interest but to deny or unduly burden the right to choose to terminate a pregnancy would fundamentally erode the well-established and crucial right at issue, and would be antithetical to the principles on which this nation and the Republican Party were founded.

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[4] In fact, members of the Texas government responsible for enacting H.B. 2 have publicly voiced their desire to limit access to abortion services, a personal interest which undoubtedly influenced the enactment of H.B. 2. For example, several months before signing H.B. 2 into law, then-Texas Governor Rick Perry declared, at an anti-abortion rally, that his goal was "to make abortion at any stage a thing of the past." Gov. Perry then went on to describe the strength of his commitment to this stated goal: "The ideal world is one without abortion. Until then, we will continue to pass laws to ensure that they are rare as possible." Linda Greenhouse, Opinion, *Abortion at the Supreme Court's Door*, N.Y. TIMES (Oct. 15, 2015), http://www.nytimes.com/2015/10/15/opinion/abortion-at-the-supreme-courts-door.html; *see also* Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 19, 2013), http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html.

ARGUMENT

I. THE LIBERTY PROTECTED BY THE CONSTITUTION ENCOMPASSES THE RIGHT TO MAKE DEEPLY PERSONAL AND SIGNIFICANT DECISIONS WITHOUT UNWARRANTED INTERFERENCE BY THE STATE

Central to the American identity is the belief that the American people have the right to be free from unwarranted government interference. This belief was enshrined in the Declaration of Independence, which describes "Liberty" as an "unalienable Right[ ]" and declares that "to secure [this and other] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This belief was further confirmed by the Declaration of Independence's proclamation that, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it." *Id.* With that, the thirteen colonies declared their independence from Great Britain, the government of which had failed to protect—indeed, had itself violated—the fundamental rights of colonial Americans.

A commitment to personal liberty from the country's Founders further led to the adoption of the first ten amendments to the United States Constitution—the Bill of Rights. Designed "to prevent misconstruction or abuse of [the newly-established government's] powers," 5 THE FOUNDERS' CONSTITUTION 40 (Philip B. Kurland & Ralph Lerner eds., 1987) (setting forth the preamble to the Bill of Rights), the Bill of Rights identified specific individual

rights the government could not abridge, such as the right to be free from laws prohibiting the free exercise of religion or abridging free speech; the right of the people to keep and bear arms; and the right to trial by jury in all suits at common law. U.S. Const. amends. I-X. Mindful of concerns that any enumeration of individual rights would be construed as an exclusive and exhaustive list, and that therefore any power not explicitly carved out by the Bill of Rights would be considered impliedly granted to the government, the drafters of the Bill of Rights included the Ninth Amendment, which provides that the enumeration of certain rights must "not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

Later amendments further protected the rights of individuals from government intrusion—including the Fourteenth Amendment, which, importantly, provided that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Due Process Clause "was 'intended to secure the individual from the arbitrary exercise of the powers of government,'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)), and "to prevent governmental power from being 'used for purposes of oppression,'" *id.* (internal citation omitted). Moreover, this clause "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). As this Court has long held, the Fourteenth Amendment's Due Process Clause "contain[s] a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (quoting *Daniels*, 474 U.S. at 331). This

substantive due process component "protect[s] against government interference with certain fundamental rights and liberty interests." *Washington*, 521 U.S. at 720; *see also Lawrence v. Texas*, 539 U.S. 558, 565 (2003) ("[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.").

Significantly, in drafting the Constitution, the Founders anticipated the potential for the government to enact laws that would intrude upon individual rights, and recognized that it would be the courts' ultimate responsibility to preserve these rights. *See* THE FEDERALIST NO. 78, at 379 (Alexander Hamilton) (Terence Ball ed., Cambridge Univ. Press 2003) ("Limitations [on the government's power] . . . can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."). And throughout its history, this Court has, on numerous occasions, done precisely what the Founders anticipated—struck down laws that unconstitutionally intrude on fundamental rights. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) ("The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.").

As this Court also has recognized, the fundamental rights and liberty interests encompassed by the Fourteenth Amendment include more than simply those enumerated rights guaranteed to the individual in the Bill of Rights. *See Casey*, 505 U.S. at 848 ("[T]he Bill of Rights . . . [does not] mark[ ] the outer limits of

the substantive sphere of liberty which the Fourteenth Amendment protects."); *see also id.* (" 'This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.' ") (citation omitted). Indeed, the Court has repeatedly affirmed that the "liberty" protected by the Constitution encompasses the right to make deeply personal and significant decisions without unwarranted interference by the state.

For example, in a pair of early cases interpreting the extent of personal liberty, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that parents and guardians have a fundamental right to direct the education and upbringing of their children, and struck down laws interfering with that right. *See Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-401, 403. Shortly thereafter, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court identified the right to procreate as "one of the basic civil rights of man," and held unconstitutional an Oklahoma statute providing for sterilization of "habitual criminals." *Id.* at 541. Then, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Court struck down a state law prohibiting interracial marriage, holding that the "freedom to marry" is "one of the vital personal rights essential to the orderly pursuit of happiness by free men," and that a fundamental right such as marriage cannot be abridged "on so unsupportable a basis as the racial classifications embodied in [anti-miscegenation] statutes." *Id.* at 2, 12. And in *Griswold v. Connecticut*,

381 U.S. 479, 485-86 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972), the Court invalidated laws criminalizing the use of contraceptives, holding that the Constitution guarantees to individuals the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453.

Thus, when this Court, in *Roe v. Wade*, 410 U.S. 113 (1973), recognized that a woman has a constitutional right to decide whether to terminate a pregnancy, that decision followed naturally from the line of cases discussed above. Indeed, the right to choose whether to terminate a pregnancy falls firmly within the same zone of profoundly personal and intimate decisions implicated in *Pierce* and *Meyer*, *Griswold* and *Eisenstadt*, *Skinner* and *Loving*. Our history, our Constitution, and this Court's jurisprudence, could not be clearer: there are certain realms of private life and personal decisions that are reserved to the individual, and certain government intrusions that are intolerable. Indeed, the very purpose of the government is to protect our liberty in those realms.

II. A WOMAN'S RIGHT TO CHOOSE WHETHER TO TERMINATE A PREGNANCY IS A FUNDAMENTAL RIGHT GUARANTEED BY THE CONSTITUTION

A. The Constitutional Right First Recognized in *Roe v. Wade* Was Reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In 1973, in its landmark case of *Roe v. Wade*, this Court recognized that a woman's right to decide whether to terminate her pregnancy is a right guaranteed by the Constitution. 410 U.S. at 153. Two decades after *Roe*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court unambiguously reaffirmed the central holding of *Roe*: that a woman has a constitutional right to choose to terminate a pregnancy before viability and to do so without undue interference from, or the imposition of substantial obstacles by, the state. *Id.* at 846. In *Casey*, the Supreme Court clearly identified the Fourteenth Amendment's guarantee of liberty as the constitutional source of a woman's right to terminate her pregnancy. *Id.* ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). "It is a promise of the Constitution," the Court wrote, "that there is a realm of personal liberty which the government may not enter." *Id.* at 847. For the reasons described below, the Court recognized that the decision to terminate a pregnancy rests squarely within this realm.

First, as it had found in previous decisions, the *Casey* Court determined that the realm of liberty protected by the Constitution includes "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," *id.* at 851 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)), and encompasses "'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,'" *Casey*, 505 U.S. at 851 (quoting *Eisenstadt*, 405 U.S. at 453 (1972)). According to the Court, "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851.

Second, the Court found that personal liberty encompasses the right to physical autonomy and bodily integrity. *Id.* at 852, 857. As the Court observed, not only is the right to choose whether to carry a pregnancy to term deeply personal and impactful, but the consequences of being unable to make such a choice are extraordinarily significant, as pregnancy imposes an enormous physical burden on a woman, and to compel a woman to continue a pregnancy against her will robs her of the right to control her own body. *Id.* at 852.

Finally, the Court recognized that, although the right to decide whether to terminate a pregnancy falls within the same realm of liberty as decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, the decision to terminate a pregnancy is distinct from the

other liberty interests protected by the Constitution, because a pregnant woman's liberty "is at stake in a sense unique to the human condition and so unique to the law." *Id.* at 852. As the Court observed, "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Id.* That bearing children and motherhood has, throughout history, "ennoble[d] [women] in the eyes of others," "cannot alone be grounds for the State to insist she make the sacrifice," the Court concluded—"[h]er suffering is too intimate." *Id.* Instead, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.*

B. *Casey* Clarified That the Government May Enact Only Those Regulations That Do Not Unduly Burden the Woman's Right to Terminate Her Pregnancy

In *Casey*, the Court also clarified what it means "'to be free from *unwarranted* governmental intrusion'" in exercising the right to decide whether to terminate a pregnancy. *Id.* at 875 (emphasis added) (quoting *Eisenstadt*, 405 U.S. at 453). According to the Court, "[n]ot all governmental intrusion is of necessity unwarranted." *Casey*, 505 U.S. at 875. Specifically, the state may enact regulations to promote its two legitimate interests: (i) its interest in "further[ing] the health or safety of a woman seeking an abortion," and (ii) its "profound interest in potential life." *Id.* at 878. However, any regulation that unduly burdens a woman's right to choose is unconstitutional. *Id.* Crucially, as the Court explained, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in

the path of a woman seeking an abortion before the fetus attains viability." *Id.* "[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends," the Court held. *Id.* at 877; *see also id.* at 878 (explaining that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right").

C. Since *Casey*, the Court Has Repeatedly Affirmed that the Constitution Protects Fundamental Rights and Liberties

For forty years, the right recognized in *Roe* and reaffirmed in *Casey* has been guaranteed and protected by the Constitution of the United States. Despite calls from an increasingly vocal minority to curtail or even terminate that right, the majority of Americans have come to see a woman's right to terminate a pregnancy prior to viability as firmly embedded in the fabric of our law and society.[5] As this

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[5] A January 2013 Pew Research Center poll explained to participants that "[i]n 1973 the *Roe versus Wade* decision established a woman's constitutional right to an abortion, at least in the first three months of pregnancy," and asked: "Would you like to see the Supreme Court completely overturn its *Roe versus Wade* decision, or not?" Sixty-three percent of respondents said no, they would not like to see *Roe* overturned; twenty-nine percent of respondents said yes. *See* Roe v. Wade *at 40: Most Oppose Overturning Abortion Decision*, PEW RESEARCH CTR. 1, 10 (Jan. 16, 2013), http://www.pewforum.org/files/2013/01/Roe-v-wade-full.pdf. Likewise, a January 2013 NBC News/Wall Street Journal Survey explained that "[t]he Supreme Court's 1973 *Roe versus Wade* decision established a woman's constitutional right to an abortion, at least in the first three months of pregnancy,"

Court stated in *Casey*, "for . . decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U.S. at 856.

Moreover, since *Casey*, the Court has reaffirmed again and again the tenet underlying that decision: that our laws and tradition mandate protection of the individual's right to make deeply personal decisions without unwarranted interference by the state. For example, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court recognized that its decision in *Casey* had "reaffirmed the substantive force of the liberty protected by the Due Process Clause," "confirm[ing] that our laws and tradition afford constitutional protection to personal decisions . . . 'central to personal dignity and autonomy,'" *id.* at 573-74 (citation omitted), and, in reliance on *Casey*, struck down a Texas law criminalizing certain intimate conduct between persons of the same sex, finding that the law ran afoul of the Fourteenth Amendment's guarantee of liberty, *id.* at 578-79. "Liberty," Justice Kennedy, delivering the opinion of the Court, wrote, "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate

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and asked respondents if they "[w]ould like to see the Supreme Court completely overturn its *Roe versus Wade* decision, or not?" Seventy percent of respondents said no, they did not want to see *Roe* overturned; twenty-four percent said yes. *Study #13018*, NBC NEWS/WALL ST. J. (Jan. 2013), http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/_Today_Stories_Teases/Supreme-court-question.pdf; *see also* Louise Radnofsky & Ashby Jones, *Support Grows for* Roe v. Wade, WALL ST. J. (Jan. 22, 2013), http://www.wsj.com/articles/SB10001424127887323301104578255831504582200.

conduct." *Id.* at 562. The Fourteenth Amendment's constitutional guarantee of liberty protects "spheres of our lives and existence," central to personal autonomy, "where the State should not be a dominant presence." *Id.* Acknowledging that, throughout the centuries, "powerful voices [have] condemn[ed] homosexual conduct as immoral," the Court concluded that "[t]he majority may [not] use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.* at 571. The Court held that the right to engage in private, consensual sexual conduct without government interference fell within the sphere reserved to the individual, and that the Texas law criminalizing certain sexual conduct furthered no legitimate state interest justifying its intrusion into the personal and private life of the individual. *Id.* at 578 ("The State cannot demean [the] existence [of homosexual persons] or control their destiny by making their private sexual conduct a crime.").

Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015),[6] the Court again affirmed that the

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[6] Between *Lawrence* and *Obergefell*, the Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013), recognizing that the Fifth Amendment's Due Process Clause also protects certain fundamental rights and liberties from intrusion by the federal government, just as the Fourteenth Amendment protects against interference by the states. *See* U.S. Const. amend. V ("No person shall be deprived of life, liberty, or property, without due process of law."). In *Windsor*, the Court addressed whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which defined marriage as "a legal union between one man and one woman as husband and wife"—thus depriving same-sex couples lawfully married under state law of the rights, benefits, and responsibilities of marriage under federal law—operated as "a deprivation of an essential part of the liberty protected by the Fifth Amendment." *Windsor*, 133 S. Ct. at 2692. Recognizing that

fundamental liberties protected by the Fourteenth Amendment "extend to certain personal choices central to individual dignity and autonomy," and again recognized that "decisions concerning marriage are among the most intimate that an individual can make." *Id.* at 2597-99. Finding that "[t]he right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment," the Court held that states could not prohibit marriage between persons of the same sex. *Id.* at 2602, 2608. The Court noted that "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." *Id.* at 2598. The Court recognized that "[t]he limitation of marriage to opposite-sex couples" was now understood to be "inconsisten[t] with the central meaning of the fundamental right to marry," and held that there was insufficient justification for the states to deny gay and lesbian individuals the fundamental right to marry partners of the same sex. *Id.* at 2602, 2607-08. "[T]o deny them this right," the Court noted, "would disparage their choices and diminish their personhood." *Id.* at 2602.

These cases, like those that preceded *Roe* and *Casey*, implicate the most intimate and significant decisions a person can make in his or her lifetime. These matters are "central to the liberty protected by the Fourteenth Amendment" because "[a]t the heart

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"[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws," this Court held that DOMA was invalid. *Id.* at 2695-96.

of liberty is the right to define one's own concept of existence, . . . [and our] [b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey*, 505 U.S. at 851.

III. THE GOVERNMENT SHOULD NOT UNDULY INTERFERE WITH A WOMAN'S LIBERTY

As noted above, this Court long has recognized that "'[t]he decision whether to bear . a child'" is among "the most intimate and personal choices a person may make in a lifetime." *Casey*, 505 U.S. at 851 (quoting *Eisenstadt*, 405 U.S. at 453). It is a decision central to a woman's "dignity and autonomy" and her "personhood." *Casey*, 505 U.S. at 851. It implicates her "control over her [own] destiny and her body." *Id.* at 869. This Court's jurisprudence makes clear that the state has no place in the deeply private realm in which this decision occurs. It is a realm reserved to the individual and the family, with recourse, if expert guidance is needed, to a medical professional.

Amici recognize that the right to terminate a pregnancy is not absolute. The state has important and legitimate interests in protecting the health and safety of a woman seeking an abortion and in protecting and promoting potential life. *Id.* at 878. However, the state may not enact laws impacting abortion that serve no legitimate state interest. *Id.*; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) ("We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' . . . [such as] the exercise of power without any

reasonable justification in the service of a legitimate governmental objective.") (internal citations omitted).

Furthermore, it is not the role of the government to dictate morality. Abortion is controversial and divisive. As this Court recognized in *Casey*, "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage." *Casey*, 505 U.S. at 850. Some Americans, of all political persuasions, are deeply ambivalent about and personally opposed to abortion. But the role of the state "is to define the liberty of all, not to mandate [its] own moral code." *Id.* at 850; *see also Lawrence*, 539 U.S. at 571. Implicit in the right to terminate a pregnancy is the right to seek moral guidance from within oneself and one's community, from spiritual advisors and trusted confidants. No matter how deeply held, the values of a legislature do not give the state license to impose those values and thereby abridge a constitutional right this Court has repeatedly affirmed. *See Casey*, 505 U.S. at 851 (noting that, "where reasonable people disagree," the "State may not compel or enforce one view or the other" if it would "intrude upon a protected liberty").

Notwithstanding the clear dictates of the Constitution and the import of this Court's prior decisions, the Texas state legislature—recognizing that it cannot terminate the right openly—has encroached upon and attempted to drastically curtail the right recognized in *Roe* and confirmed in *Casey*. Indeed, acting under false pretenses, the Texas legislature enacted H.B. 2, which contains provisions that purport to further the state's interest in protecting health and safety but which medical

experts almost universally agree provide no medical benefits to abortion patients whatsoever. *See* Appellees' Principal & Resp. Br. at 19-26, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. Nov. 24, 2014) [hereinafter Appellees' Principal & Resp. Br.]; *see also, e.g.*, J.A. 260-93 (Direct Testimony of Elizabeth Gray Raymond, M.D., M.P.H.), J.A. 371-89 (Direct Testimony of Paul M. Fine, M.D.). Not only will the challenged provisions fail to advance the state's interest in health and safety, they will actually have the opposite effect. Appellees' Principal & Resp. Br. at 26-29. Because these provisions will drastically reduce the number of facilities providing abortion services in Texas, many women will be left unable to access safe and legal abortion services, and others will be significantly delayed in their ability to obtain such services. *Id.*; *see also* J.A. 289-92. While first and second trimester abortions are incredibly safe,[7] the

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[7] The lack of any legitimate state interest in the challenged provisions of H.B. 2 is highlighted by statistics on complications stemming from abortions. One large scale study of almost 55,000 abortions in the years 2009 and 2010 found that less than one quarter of one percent (0.23%) of abortions resulted in major complications; 2.1% resulted in any complication, the vast majority of which were minor; and only 0.87% of abortions resulted in an emergency room visit. *See* Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS & GYNECOLOGY 175-83 (2015). According to the study's authors, the overall complication rate for abortion is thus lower than the complication rate for wisdom tooth removal, *see* Mandy Oaklander, *Abortion Complication Rates Are "Lower Than That For Wisdom Teeth Extraction," Study Says*, TIME (Dec. 9, 2014), http://time.com/3623572/abortion-safe-complications/—but no Texas regulations equivalent to the challenged provisions of H.B. 2 apply to dentists and the facilities in which they remove wisdom teeth, *see* Appellees' Principal & Resp. Br. at 7.

risks associated with abortion rise with a fetus's gestational age, *see, e.g.*, J.A. 290, which means that delay will increase the possibility of complications, and the challenged provisions will thus bring about the very harms they claim to seek to prevent. This Court has explicitly held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the" woman's constitutionally-protected right to terminate her pregnancy and are therefore invalid. *Casey*, 505 U.S. at 878. The challenged provisions of H.B. 2 are just such "unnecessary health regulations." They purport to protect the health and safety of women, but in effect severely (and deliberately) limit the availability of safe and legal abortions while conferring no genuine health benefits.

These provisions thus impose an undue burden on a woman's right to terminate her pregnancy and are as disruptive to a woman's liberty interests as an open and transparent attempt to eliminate the right altogether. In fact, the curtailment of liberty on the type of pretextual grounds that underlie the challenged provisions of H.B. 2 is even more insidious than an open and straightforward ban, for when the government conceals its motives, its actions are more difficult to review. The case now before this Court is an example of the consequences that flow from a legislature concealing its motivations. As evident in the record before this Court, the Texas legislature maintained before the lower courts that its motivation in enacting H.B. 2 was to further protect the health and safety of women, leading the Fifth Circuit to decide, wrongly, that the state's interest in enacting

H.B. 2 was legitimate.[8] *Whole Woman's Health v. Cole*, 790 F.3d 563, 584-86 (5th Cir. 2015).

Moreover, a woman's ability to exercise her right to terminate her pregnancy before viability should not be dictated by the politics of the persons governing her state. If the liberty protected by the Constitution is to be meaningful at all, it must mean the same thing in every state, for every woman. Since *Roe*, certainty of the ability "to control their reproductive lives" has enabled women "to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. Women should be able to continue to rely on the availability of the right to terminate a pregnancy and thereby control their reproductive lives[9]—not be

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[8] Although a comprehensive discussion of the Fifth Circuit's decision is outside the scope of this brief, *amici* also believe it is plain that the Fifth Circuit erred when, in assessing whether the challenged provisions of H.B. 2 impose an undue burden, it refused to consider the extent to which these provisions actually further the state's asserted interest. *See Whole Woman's Health*, 790 F.3d at 586-87. The Fifth Circuit's decision is inconsistent with this Court's opinion in *Casey*, which requires scrutiny of the extent to which regulations advance the state interest they purport to serve. *See Casey*, 505 U.S. at 878, 900-01 (holding that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," and upholding recordkeeping and reporting provisions only after concluding that they served the state's interest in protecting the health and safety of women seeking abortions).

[9] The closure of so many facilities means that many women will be denied access not only to abortion services but also to other reproductive health services provided by such facilities. For example, Reproductive Services of El Paso, a facility discussed in the Fifth Circuit's decision which is in danger of closing if the Circuit decision is affirmed, *see Whole Woman's Health*, 790 F.3d at 596-98, provides not only abortion services but also a full range of family planning options, including birth control pills,

subjected to the uncertainty that will flourish if encroachment upon their rights on flimsy pretext is permitted to stand, and perhaps proliferate.

The right first recognized in *Roe* and reaffirmed in *Casey* is in danger of becoming a right in name only for women in Texas. If the Fifth Circuit's decision is affirmed, it will have a profound effect on the lives of thousands of women, and on their families. It will also have a destructive effect on our understanding, as a nation, of the meaning of liberty, and of the extent to which the government can intrude upon our liberty and interfere with the most personal decisions of our lives. *Amici* thus speak for ourselves and like-minded others in saying that we believe both our law and values dictate that the bar must be very high for the government to interfere with a decision as intimate and central to personal autonomy as the decision to

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contraceptive devices, and information on natural family planning and abstinence, *see Gynecological Services*, https://reproductiveservices.com/gyn-services/ (last visited Dec. 28, 2015). Similarly, Whole Woman's Health, which provides not only abortion services but also birth control counseling and other reproductive health services, was forced to close its facilities in Austin, Texas and Beaumont, Texas because of the challenged provisions of H.B. 2. *See Other Clinics*, http://wholewomanshealth.com/other-clinics.html (last visited Dec. 28, 2015). Access to family planning services and contraception allows women to exercise control over their reproductive lives before an unplanned pregnancy occurs.

terminate a pregnancy.[10] Ideologically-motivated, pretextual legislation designed to deny the right does not clear this bar. On the contrary, such legislation is antithetical to the values of this liberty-loving nation. It is also antithetical to our founding principles, to the firmly established law of this Court, and to the Republican philosophy that only through small, less-intrusive government will individual rights be honored and preserved.

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[10] Indeed, the reasons a woman may decide to terminate a pregnancy are as varied and numerous as the women who make the decision. The decision is informed, among other things, by each woman's age, family, beliefs, health, and the circumstances in which she finds herself when she becomes pregnant. A decision this personal and informed by such individualized concerns should not be subject to restrictions by lawmakers absent compelling justification.

CONCLUSION

For the foregoing reasons, *amici* submit that the challenged provisions of H.B. 2 intrude upon a private realm reserved to the individual and impose an undue burden on a woman's liberty interest under the Fourteenth Amendment. The decision of the Fifth Circuit should therefore be reversed in its entirety.

Respectfully submitted,

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